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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ANTONIO C. JONES, Defendant and Appellant.	A112636 (Marin County Super. Ct. No. SC144713)

Defendant Antonio C. Jones appeals from a judgment imposing a 16-month prison term following his guilty plea to receiving stolen property. He contends the trial court abused its discretion in denying him probation while granting it to a female codefendant who pled guilty to the same charge. We find no abuse of discretion and shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On the evening of November 21, 2005, police officers were dispatched to a home in Belvedere that had been burglarized. Among the items stolen were two laptops, a watch, gold coins, loose change, and various sets of cufflinks and other jewelry with a total value of $11,183.77. In the early morning of the following day, after receiving a report of two individuals loitering in the middle of a road, police detained defendant and Amber Troupe. Defendant stated that he and Troupe worked for a sales company called "Go-Doers" which sold magazines door-to-door and had missed their pick up and needed a ride to their hotel in South San Francisco. Troupe was carrying a backpack that contained the two laptop computers and a Missouri driver's license issued to another

individual. Originally she told officers that defendant had given her the laptops to hold but later changed her story, saying that a White male named "Evertt" had given her one of the computers and defendant the other.

The officers searched defendant's pockets and discovered several sets of cufflinks, a watch, coins, and other items. During the search defendant yelled at Troupe, asking if she wanted him to take the "wrap for this," to which she did not respond. At that time, defendant told the officers that someone had given them the computers while they were soliciting. Later, however, while being interviewed at the police station, defendant said he bought the computers from a man on the street for $40 and that the jewelry was stolen. When told that the stolen jewelry came from the same home as the computers, defendant did not respond.

During defendant's probation interview, he changed his story yet again. This time he stated that he had found the jewelry, cufflinks, and the laptop computers on the side of the road in a paper bag. According to defendant, he ran into Troupe and asked her to put the computers into her back pack. He stated that he had made up the story that he told to police and apologized for taking items that did not belong to him. Defendant also commented that "regardless of the sentence that the judge gives him, he [did] not want this to happen again."

All of the stolen items, except for the loose change, were returned to the victim and both defendant and Troupe pled guilty to the single charge of receiving stolen property (Pen. Code, § 496). At the sentencing hearing Troupe's counsel argued that her client, age 19, was naïve and foolish for believing the stolen items were gifts, and that she intended to return to school. The court, in placing Troupe on probation for three years, stated "you're a young person, and I'd like to see you do well in the world. That's the object of the probation."

Despite the recommendation of the probation officer that defendant also be placed on probation because this was his first felony conviction and he had a difficult childhood but was then employed and had recently become a father, and despite the district attorney's acquiescence in that recommendation, the court denied defendant probation

and imposed the mitigated term of 16 months in state prison. While taking into consideration defendant's early guilty plea and minimal record, the court found there to be a "substantial difference" between defendant and Troupe, who is nine years younger than he, and stated that it did not believe any of defendant's versions of how he came into possession of the stolen property. The court considered defendant "very substantially culpable" for what had occurred and felt that he "baited the codefendant in being involved in some substantial part of carrying the stolen property however it was acquired." The court considered defendant to be of "mature" age, in possession of "10 or 11 thousand dollars" worth of stolen property, making the crime a serious offense. The court also mentioned that since defendant did not live in the area, he was not a good candidate for probation.

Defendant timely filed a notice of appeal.

DISCUSSION

Whether to grant probation generally rests within the broad discretion of the sentencing court and will not be disturbed on appeal except on a showing that the court exercised its discretion in an arbitrary or capricious manner. (*People v. Edwards* (1976) 18 Cal.3d 796, 807; *People v. Hernandez* (1980) 111 Cal.App.3d 888, 898.) It does not matter that the appellate court, had it been the sentencing court, might have selected a different sentence. "[A]ppellate courts do not have the power to modify a sentence or reduce the punishment therein imposed absent error in the proceedings." (*People v. Giminez* (1975) 14 Cal.3d 68, 72.) Nor do the favorable recommendations of the probation officer and the district attorney compel a grant of probation. Such recommendations are advisory only. (*People v. Warner* (1978) 20 Cal.3d 678, 683.)

Defendant contends the denial of probation constituted an abuse of discretion, arguing that the court's decision was not based on any legitimate distinction between Troupe and himself. He contends the court relied on three impermissible factors: (1) defendant's age in relation to Troupe; (2) the court's irritation with defendant for lying to the arresting officer; and (3) the court's mistaken belief that defendant was found in possession of all the stolen items.

Defendant cites *People v. Rodriguez* (1986) 42 Cal.3d 730 as authority for his argument that the court could not properly consider his age in deciding whether to grant or deny probation. Neither that case nor any other so holds. *Rodriguez* simply indicates that during the penalty phase of a murder trial the prosecutor may comment on a defendant's age in discussing choice of penalty. While the Supreme Court stated that mere chronological age alone should not itself be deemed an aggravating factor, the court found no impropriety in the argument that the defendant was less deserving of leniency than a younger, perhaps less sophisticated offender. (*Id.* at p. 789.) Here, the court stated that defendant is "a mature person, and, as far as I can tell from what I see here he baited the codefendant in being involved in some substantial part of carrying the stolen property however it was acquired, and that's my view of the credible reading of the evidence." Defendant was nine years Troupe's elder and he admitted to the probation officer that he gave the two stolen laptop computers to Troupe to hold. The court's reliance on these factors was well within its broad discretion. (See Cal. Rules of Court, rule 4.414(a)(6) [whether defendant was an active or passive participant is a relevant criterion affecting the decision to grant or deny probation].)

Defendant argues that the court impermissibly allowed annoyance with defendant for lying to the arresting officer to influence its decision to deny probation. However, while a court should not allow irritation with a defendant to distort its decisionmaking, it was proper for the court to consider that defendant told constantly changing stories to different law enforcement officers about how he acquired the stolen property. (See *People v. Podesto* (1976) 62 Cal.App.3d 708, 724 [defendant's deceit to a probation officer properly considered].) Defendant argues that the changes in his account are irrelevant because he was not charged with having stolen the property, but the fact that he was not charged with burglary does not mean that the trial court could not consider his untruthfulness to investigators and the court in deciding whether to grant probation. If nothing else, his persistent falsification was an indication of a lack of remorse, which is a proper criterion for consideration. (See Cal. Rules of Court, rule 4.414(b)(7).)

Defendant further contends that the court mistakenly believed him to have been in possession of all of the stolen property. When the court stated that defendant had been in possession of "10 or 11 thousand dollars worth of someone else's property," his attorney quickly noted that he was not in possession of the laptops, to which the court responded, "I consider him to be in possession of those as well." Given defendant's admission that he originally possessed all of the items and gave the computers to Troupe to hold, this was not an unreasonable view for the court to take. The record is clear that the trial court properly understood the circumstances of the offense. It properly considered the value of the stolen property with which he was found. (See Cal. Rules of Court, rule 4.414(a)(5).)

Considering the record as a whole, we are satisfied that the court's decision to deny probation was based upon proper considerations.[1] There was no abuse of discretion.

DISPOSITION

The judgment is affirmed.

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Pollak, J.

We concur:

_____
McGuiness, P. J.

_____
Siggins, J.

[1] Defendant's brief contains a passing suggestion that the court's decision was based upon improper consideration of his gender, but the brief contains no elaboration and we find nothing in the record to warrant any discussion of the issue.